FILED
061488 MAY 08 2007
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No. 06-

IN THE

Supreme Court of the United States

GEORGE L. YOUNG and PROFESSIONAL BUSINESS SERVICES,

Petitioners,

v.

ROBERT A. PUMMILL, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether 11 U.S.C. § 303(a) divests a bankruptcy court of subject matter jurisdiction over involuntary bankruptcy petitions brought against farmers.

PARTIES TO THE PROCEEDING

The following individuals and entities are parties in the court below:

Robert A. Pummill, Charles E. Rendlen III, United Producers, David C. Stover, First National Bank, Erlene W. Krigel, U.S. Bank Nation Association, Allan Messinger, Van Korell, Gale Bretschneider, Robert Brummer, Hilda Ciarrocchi, Patricia Ciarrocchi-Houchins, Central Plains Land & Cattle Co., CFZ Cattle, Currey Kids, Currey Land Company, Curreys, Richard Currey, Loren Eckert, James Eggerling, Eggerling Investments, Gerald Eggerling, James Eggerling, Marcella Eggerling, Nancy Eggerling, Timothy Eggerling, FDH Farms, Mason Fleenor, Richard and Stuart Fox, Mike Frazier, Scott Garrett, G.E. Cattle Co., Deb Hansen, Forrest Hansen, Mark R. Hansen, Mark R., Pam Hansen, Sara Houchins, J&D Cattle, Co., Johnson Cattle, David Jones, Robin Jordening, Dennis Kolb, Jeff Krupicka, Kuchta Farms, Diane Kuchta, Rick Kuchta, Harry Hayes, Allen Houchins, Dallas Houchins, James Houchins, Patricia Houchins, Jean Mitchell, Oertwich Farms, Randall M. Oertwich, J.R. Pauley, Douglas Putensen, David Riessen, Everett "Arky" Rogers, S.E. Farms, Marilyn Sokol, Serge Sokol, Tom Stewart, T.E. Farms, Dean Thielen, Kim Triggs, Harry Vander Pol, Lyle Vander Pol, Gene White, Weitzenkamp Farms, Mike Zalman, Grauf Cattle Farms, Jerry T. Grauf, Mary Grauf, Jim Hammond, Dorothy Hammond, J&D Livestock, United Producers, Alfred Neuberger Cattle Company, LAN Cattle Company, E&J Cattle Company, Alan J. Neuberger, U.S. Bank National Association.

CORPORATE DISCLOSURE STATEMENT

Petitioner Professional Business Services, Inc. is wholly owned by George L. Young and Kathleen McConnell.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners George L. Young ("Young") and Professional Business Services, Inc., ("PBS") respectfully pray that a writ of certiorari be issued in this case. Petitioners are farmers against whom an involuntary petition for bankruptcy was filed and prosecuted, directly contrary to federal law.

OPINIONS BELOW

The order of the United States Court of Appeals for the Eighth Circuit denying the petition for rehearing (Appendix F at 48a - 50a), dated February 7, 2007, is not reported. The per curiam decision of the United States Court of Appeals for the Eighth Circuit affirming that a bankruptcy court has subject matter jurisdiction over an involuntary Chapter 7 bankruptcy petition brought against a farmer (Appendix A at 2a), dated December 6, 2006, is not reported. The opinion of the United States Bankruptcy Appellate Panel for the Eighth Circuit affirming that a bankruptcy court has subject matter jurisdiction over an involuntary Chapter 7 bankruptcy petition brought against a farmer (Appendix B at 3a - 11a), dated January 12, 2006, is reported at *U.S. Bank Nat'l Ass'n v. Young (In re Young)*, 336 B.R.775 (8th Cir. B.A.P. 2006). The memorandum opinion of the United States Bankruptcy Court for the Western District of Missouri, dated April 1, 2005, granting motions for summary judgment against Petitioners and concluding that an objection to an involuntary bankruptcy petition by a debtor-farmer is not jurisdictional but is, rather, an affirmative defense that can be waived (Appendix C at 12a - 21a) is reported at *U.S. Bank Nat'l Ass'n v. Young (In re Young)*, 323 B.R. 484 (Bankr. W.D. Mo., 2005). The memorandum opinion and order of the

United States Bankruptcy Court for the Western District of Missouri, dated November 15, 2001, denying motions to convert (Appendix D at 22a - 46a) is not reported. The order of the United States Bankruptcy Court for the Western District of Missouri for relief under Chapter 7 (Appendix E at 47a), dated August 22, 2001, is not reported.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The order of the bankruptcy court granting creditors' motions for summary judgment against Petitioners was entered on April 1, 2005. (Appendix C). The United States Bankruptcy Appellate Panel for the Eighth Circuit accepted jurisdiction over Petitioners' timely appeal in its opinion dated January 12, 2006. (Appendix B). After a timely notice of appeal being filed, the United States Court of Appeals for the Eighth Circuit accepted jurisdiction over Petitioners' appeal in its per curiam decision dated December 6, 2006. (Appendix A). The United States Court of Appeals for the Eighth Circuit denied Petitioners' timely petition for rehearing on February 7, 2007. (Appendix F).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Article III, Section 1 and 2

Section 1.

The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the

Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

Section 2.

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;—to all cases affecting ambassadors, other public ministers and consuls;—to all cases of admiralty and maritime jurisdiction;—to controversies to which the United States shall be a party;—to controversies between two or more states;—between a state and citizens of another state;—between citizens of different states;—between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed.

Title 11 United States Code § 101(20).

Definitions.

20) The term "farmer" means (except when such term appears in the term "family farmer") person that received more than 80 percent of such person's gross income during the taxable year of such person immediately preceding the taxable year of such person during which the case under this title concerning such person was commenced from a farming operation owned or operated by such person;

Title 11 United States Code § 303(a)

Involuntary cases.

a) An involuntary case may be commenced only under chapter 7 or 11 of this title, and only against a person, except a farmer, family farmer, or a corporation that is not a moneyed, business, or commercial corporation, that may be a debtor under the chapter under which such case is commenced.

Title 28 United States Code § 157(a).

Procedures.

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

Title 28 United States Code § 1334.

Bankruptcy cases and proceedings.

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(c)

(1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

(d) Any decision to abstain or not to abstain made under this subsection [1] (other than a decision not to abstain in a proceeding described in subsection (c)(2)) is not reviewable by appeal or otherwise by the court of appeals under section 158 (d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title. This subsection [1] shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

(e) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.

Rule 12(h) Federal Rules of Civil Procedure.

Defenses and Objections—When and How Presented—By Pleading or Motion—Motion for Judgment on the Pleadings.

(h) Waiver or Preservation of Certain Defense

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

STATEMENT OF THE CASE

This Petition seeks to safeguard a cornerstone of the Bankruptcy Code, codified in 28 U.S.C. § 303(a), that farmers are immune from involuntary bankruptcy. Adopted by Congress in the earliest days of the Bankruptcy Act of 1898, this vital feature was expanded in the current Bankruptcy Code, recognizing the cyclical nature of the farmer's business and the inconvertible nature of the farmer's assets—land and permanent fixtures. Accordingly, Congress immunized from involuntary bankruptcy one of the largest classes of persons in this Country—farmers. This immunity afforded farmers also recognizes the reality that forcing farmers into involuntary bankruptcies would undermine the security of this Country's food production and supply, as well as its economy.

The essential facts are not reasonably in dispute. Petitioner Young, formerly a resident of Grant City, Missouri, was engaged in extensive cattle operations–thousands of cattle on 43 feed lots and farms—in Missouri, Iowa and Nebraska prior to August 2001. Management of the

operations was conducted by Petitioner PBS. Significantly low cattle prices forced Young to discontinue the operation of his cattle business on or about August 10, 2001, shortly before the filing date of the involuntary bankruptcy petition.

Though not objecting to the petition, counsel for Petitioners at the time answered the petition, stating that Petitioners were farmers. Subsequently confronted by various motions for summary judgment by creditors, Petitioners' current counsel argued, under 28 U.S.C. § 303(a), that the bankruptcy court lacked subject matter jurisdiction to allow an involuntary petition against a farmer. The court rejected Petitioners' contention, instead concluding that "farmer" status is an affirmative defense that can be waived. To date, Petitioners' assertions that they are farmers have not been refuted, rejected, nor foreclosed.

Claims were asserted that Young sold interests in over 343,000 cattle, but that there were only just under 29,000 cattle in existence. The combined claims of over 500 creditors amounted to nearly $180,000,000.00. The story rocked the mid-west of this Country. Young voluntarily disclosed his conduct to the authorities and assisted the Federal Bureau of Investigations ("FBI") in understanding his activities. This case is extremely unique, in that victims were paid profits they were not entitled to receive. Moreover, in contrast to most fraud cases, Petitioners here did not benefit from the scheme. Rather, the funds were used to pay investors.

Creditors filed the involuntary Chapter 7 petition against Petitioners on August 20, 2001. The bankruptcy court granted several motions for summary judgment against Petitioners on April 1, 2005, concluding that an objection to an involuntary bankruptcy petition by a debtor-farmer is not

jurisdictional but is, rather, an affirmative defense that can be waived.

Petitioners filed a timely Notice of Appeal on April 10, 2005. The decision of the United States Bankruptcy Appellate Panel for the Eighth Circuit affirming the bankruptcy court was filed on January 12, 2006.

Petitioners filed a timely Notice of Appeal on January 31, 1006. The decision of the United States Court of Appeals for the Eighth Circuit affirming the BAP was filed on December 6, 2006. Petitioners timely filed their Petition for Rehearing *En Banc* on January 3, 2007. On February 7, 2007, the United States Court of Appeals for the Eighth Circuit denied the Petition for Rehearing *En Banc*.

REASONS FOR GRANTING THE PETITION

This case is unique for its scale and its importance. The Eighth Circuit's decision here vitiates the long-standing public policy immunizing farmers from involuntary bankruptcy. In addition, the Eighth Circuit's allowance of an involuntary petition against a farmer conflicts with holdings of other Circuit Courts of Appeals and disregards at least three concerns recognized by this Court as deeply embedded in American jurisprudence: that a federal court is duty-bound to constantly assess whether jurisdiction is proper; that a party cannot confer jurisdiction on a court by consent or waiver; and that the Bankruptcy Code must be liberally interpreted to give debtors the full measure of relief afforded by Congress.

I. Review Is Warranted Because The Question Presented Is Of Public Importance

The Eighth Circuit's decision here vitiates the long-standing public policy immunizing farmers from involuntary bankruptcy. In the Bankruptcy Act of 1898, Congress carefully immunized from involuntary bankruptcy the two largest classes of persons, wage-earners and tillers of soil–farmers. Congress recognized the cyclical nature of the farmer's business. It was thought then, as it was during the Great Depression and during difficult times farmers faced in the 1970's and 1980's that a year of drought or low prices should not subject a farmer to involuntary bankruptcy. *See H.D. Still's Sons v. American Nat'l Bank*, 209 F. 749, 756 (7th Cir. 1913), *cert. denied*, 232 U.S. 723, 34 S. Ct. 331, 58 L. Ed. 815 (1914); *In re Lange*, 39 B.R. 483, 483-85 (Bankr. D. Kan. 1984). Similarly, Congress recognized the inconvertible nature of the farmer's assets—land and permanent fixtures. The Act was intended to impose involuntary bankruptcy on trades and middlemen because of the fluid nature of their transactions, the convertible nature of their assets and the inadequacy of state laws to prevent fraud upon creditors. *See H.D. Still's Sons v. American Nat'l Bank*, 209 F. at 756. In the 1970's, the Committee on the Judiciary received a report reaffirming that a creditor should not be allowed to compel a farmer's liquidation in a bankruptcy proceeding. *See Report of The Commission of the Bankruptcy Laws of the United States July 1973*, H.R. Doc. No. 93-137, 93rd Cong., 1st Sess., pt. 1 at 224 (1973). More recently, Congress expanded the immunity granted farmers by broadening the definition of "farmer" to include farming corporations and agri business *See In re Dakota Lay'd Eggs*, 57 B.R. 648, 653 (Bankr. D. N.D. 1986); *In re The Blanton Smith Corporation*, 7 B.R. 410, 413-14 (Bankr.

M.D. Tenn. 1980); 131 Cong Rec S 3314 (99th Cong. 1st Sess. March 20, 1985) (observing that involuntary bankruptcy proceedings cannot be commenced against a farmer); 131 Cong. Rec E 777 (99th Cong. 1st Sess., March 5, 1985) (The Honorable Mike Synar of Oklahoma in the House of Representatives notes that the bankruptcy code prohibits involuntary liquidation proceedings against farmers).

Thus, the long-standing policy against forcing farmers into involuntary bankruptcy has been effective and has deep historical roots. *See Id.* This immunity afforded farmers also recognizes the reality that forcing farmers into involuntary bankruptcies would undermine the security of this Country's food production and supply, as well as its economy. The Eighth Circuit's decision here, which relies on its prior decision in *In re Marlar*, 432 F.3d 813, 814-15 (8th Cir. 2005) and on the Fifth Circuit's decision in *McCloy v. Silverthorne (In Re McCloy)*, 296 F.3d 370, 375 (5th Cir. 2002), vitiates this long-standing, important public policy and should be reviewed by this Court.

II. Review Is Warranted Because The Lower Court's Allowance Of An Involuntary Petition Against A Farmer Conflicts With Holdings Of Other Circuit Courts of Appeals

The Eighth Circuit's holding here that the exclusion of farmers from involuntary bankruptcies in 11 U.S.C. § 303(a) is merely an affirmative defense that may be waived adopts the holdings in that court's prior decision in *In re Marlar*, 432 F.3d 813, 814-15 (8th Cir. 2005) and the Fifth Circuit's decision in *McCloy*, 296 F.3d at 375. These decisions cannot be reconciled with the Fourth Circuit's holding in *H.D. Still's Sons v. American Nat'l Bank*, 209 F. at 756-57, that a

partnership engaged in farming "has the same immunity from involuntary bankruptcy as a 'natural person' of like vocation." That is, the farmer exclusion is jurisdictional as to subject matter jurisdiction, exempting farmers as a class from compulsory proceedings. *Id.*

Though recognizing the general grant of subject matter jurisdiction in 28 U.S.C. §§ 157 (a) and 1334, and presumably the jurisdictional grant in the Constitution, Article III, Section 2, the Fifth and Eighth Circuit decisions rely on a perceived conflict between the interpretation that § 303(a) is jurisdictional and the language of 11 U.S.C. § 303(h). Indeed, the court in *In re Marlar* stated: "we read [§ 303(h)] to mean that a farmer against whom an involuntary petition is filed must timely controvert the petition by raising his or her status as a farmer in order to preclude the commencement of an involuntary petition." *Id.*, 432 F.3d at 815. That decision adds: "[t]o hold otherwise would interfere with the bankruptcy court's ability to proceed in involuntary cases . . . ." *Id.* However, this reasoning fails to consider that it is the nature of jurisdictional issues to interfere with a court's ability to proceed. Reliance on § 303(h) should not defeat this principle.

Simply, interpreting the immunity afforded farmers in § 303(a) as jurisdictional leaves nothing to reconcile between § 303(a) and § 303(h). Treating the plain language of § 303(a) as a jurisdictional bar to involuntary petitions against farmers is similar to its bar against involuntary chapter 13 petitions. Section 303(h) merely provides a remedy–not the only remedy, *see* Rule 12(h(3), F.R.Civ.P.–to those facing a proper involuntary petition, most of whom will not assert a defense for lack of subject matter jurisdiction. Contrary to the decisions of the Fifth and Eighth Circuits above, § 303(h)

adds nothing to the analysis of whether § 303(a) is jurisdictional. The conflict between the Fourth Circuit's reading of the immunity afforded farmers in § 303(a) as being jurisdictional and the Fifth and Eighth Circuits' decisions that the exclusion is merely an affirmative defense warrants review by this Court.

III. Review Is Warranted Because The Lower Court's Allowance Of An Involuntary Petition Against A Farmer Disregards The Maxim That A Federal Court Is Duty-Bound To Constantly Assess Whether Jurisdiction Is Proper

The Eighth Circuit's allowance of an involuntary petition against a farmer disregards the maxim that when a lack of subject matter jurisdiction is brought to a court's attention, the court should decline *sua sponte* to proceed in the cause. *United States v. Corrick*, 298 U.S. 435, 440, 56 S. Ct. 829, 80 L. Ed. 1263 (1936). Various Circuit Courts of Appeal have relied on this maxim in considering whether a lack of subject matter jurisdiction exists under aspects of § 303(a) other than the immunity afforded farmers. *See, e.g.*, *McCloy*, 296 F.3d at 373 ("a lack of subject matter jurisdiction may be raised at any time"); *Randall & Blake, Inc. v. Evans (In Re Canion)*, 196 F.3d 579, 584 (5th Cir. 1999) (courts must be assured of their subject matter jurisdiction at all times); *Benny v. Chicago Title Ins. Co (In Re Benny)*, 842 F.2d 1147, 1149 (9th Cir. 1988), *cert. denied*, 488 U.S. 1014, 109 S. Ct. 806, 102 L. Ed. 2d 796 (1989) (an objection to subject matter jurisdiction "may be made at any time consistent with Fed. R. Civ. P. 12(h)(3)."); *In Re New York Tunnel Co.*, 166 F. 284, 285 (2nd Cir. 1908) ("if the appellants and petitioners have called our attention to a jurisdictional defect . . . we feel bound to consider it."); Rule 1011, F.R.Bankr.P. and its

reference to Rule 12(b), F.R.Civ.P.; Rule 12(h)(3), F.R.Civ.P. Indeed, a federal court is duty-bound to determine whether jurisdiction is proper with or without a pending motion. *In re Martinez*, 721 F.2d 262, 264 (9th Cir. 1983). Only Congress may determine a lower federal court's subject matter jurisdiction. *Kontrick v. Ryan*, 540 U.S. 443, 452, 124 S. Ct. 906, 157 L. Ed. 2d 867 (2004). "[A] court's subject matter jurisdiction cannot be expanded to account for the parties' litigation conduct. . . ." *Id.* at 456. The assumption by parties that jurisdiction exists does not necessarily establish that jurisdiction does exist.

Accordingly, though a court may acquire initial jurisdiction by the filing of an involuntary petition, *In re Rubin*, 769 F.2d 611, 614 n.3 (9th Cir. 1985), in order to retain jurisdiction both legal and factual determinations must be made. Here, once the bankruptcy court was apprised of Petitioners' status as farmers, the court should have recognized that it no longer retained subject matter jurisdiction. It failed to do so. The Eighth Circuit perpetuated this mistake, electing to ignore the jurisdictional aspects of § 303(a) and construe, without any analysis, the immunity afforded farmers as an affirmative defense that may be waived. The lower court's holding warrants review by this Court.

IV. Review Is Warranted Because The Lower Court's Allowance Of An Involuntary Petition Against A Farmer Disregards The Maxim That A Party Cannot Confer Jurisdiction On A Court By Consent Or Waiver

Next, the Eighth Circuit's allowance of an involuntary petition against a farmer disregards the maxim that a party

cannot confer jurisdiction on a court by either consent or waiver. Subject matter jurisdiction goes to the extent to which a court can rule on the conduct of persons or the status of things. It cannot be conferred on a court by agreement, consent or otherwise. *American Fire & Casualty Co. V. Finn*, 341 U.S. 6, 18 n.17, 71 S. Ct. 534, 95 L. Ed. 702 (1951); *In re Stable Mews Associates*, 778 F.2d 121, 124 (2nd Cir. 1985). Similarly, the lack of subject matter jurisdiction cannot be waived by a party. *See Corrick*, 298 U.S. at 440.

Just as the Eighth Circuit's decision here violates the foregoing two maxims, so do the Eighth's Circuit's decision in *In re Marlar*, 432 F.3d 813, 814-15 (8th Cir. 2005) and the Fifth Circuit's decision in *McCloy*, 296 F.3d at 375, both of which the instant lower court relied upon. The Eighth Circuit's decision here warrants review by this Court.

V. Review Is Warranted Because The Lower Court's Allowance Of An Involuntary Petition Against A Farmer Disregards This Court's Holding That The Bankruptcy Code Must Be Liberally Interpreted To Give Debtors The Full Measure Of Relief Afforded By Congress

Finally, the Eighth Circuit's allowance of an involuntary petition against a farmer disregards a tenet of this Court expressed in *Wright v. Union Central Life Ins. Co. (Wright II)*, 311 U.S. 273, 279, 61 S. Ct. 200, 85 L. Ed. 184 (1940) (*quoted in In re Mahaffey*, 129 F.2d 292 (2nd Cir. 1942)), that the Bankruptcy Act—and current Code—"must be liberally construed to give the debtor the full measure of the relief afforded by Congress . . . lest its benefits by frittered away by narrow formalistic interpretations which disregard the spirit and the letter of the Act." It is manifest that the

immunity from involuntary bankruptcy that the Act and Code afford farmers would be "frittered away" if lower courts may simply ignore the plain language of § 303(a) precluding compulsory action against farmers. Indeed, "[t]o hold that the farmer can be involuntarily liquidated against his will . . . would ignore the direction of *Wright II* by failing to construe the Code in the favor of the farm debtor. . . ." *In re Lange*, 39 B.R. at 486.

Just as the Eighth Circuit's instant decision disregards this Court's foregoing tenet, so do the Eighth's Circuit's decision in *In re Marlar*, 432 at 814-15 and the Fifth Circuit's decision in *McCloy*, 296 F.3d at 375, both of which the instant lower court relied upon. The Eighth Circuit's decision here warrants review by this Court.

CONCLUSION

For all the foregoing reasons, Petitioners respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,

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APPENDIX

APPENDIX A — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT FILED DECEMBER 6, 2006

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 06-1421

In re: George L. YOUNG; Professional Business Services, Inc.; United Livestock Services, LLC, f/k/a MFA Livestock Services, LLC; Rio Baca, Inc., a/k/a Rio Baca Ranch, a/k/a Rio Baca Cattle Co., a/k/a Rio Baca Feedlot; Rio Timba, Inc.,

Debtors.

Alfred Neuberger Cattle Company, Inc.; Lan Cattle Company; E & J Cattle Company; Alan J. Neuberger; U.S. Bank National Association,

Appellees,

v.

George L. Young; Professional Business Services, Inc.,

Appellants.[1]

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1. An official caption containing a complete list of parties is on file and available for inspection in the Office of the Clerk of Court, United States Court of Appeals for the Eighth Circuit.

Appendix A

Appeal from the United States Bankruptcy Appellate Panel for the Eighth Circuit

Submitted: October 20, 2006
Filed: December 6, 2006

Before WOLLMAN, RILEY, and GRUENDER, Circuit Judges.

PER CURIAM.

George L. Young (Young) contends the bankruptcy court lacked jurisdiction because 11 U.S.C. § 303(a)[2] divested the court of subject matter jurisdiction over involuntary bankruptcy petitions brought against farmers. In *In re Marlar*, 432 F.3d 813, 814-15 (8th Cir.2005) (per curiam), we concluded § 303(a) provides farmers with an affirmative defense to the commencement of involuntary bankruptcy petitions, and it does not strip the bankruptcy courts of subject matter jurisdiction. Young concedes *In re Marlar* is the controlling precedent and asks us to recommend to the en banc court that *In re Marlar* be overruled. We conclude *In re Marlar* controls, and we further believe *In re Marlar* was correctly decided and therefore decline the invitation to recommend this appeal be heard en banc.

We affirm the judgment of the Bankruptcy Appellate Panel.

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2. Section 303(a), in relevant part, provides:

> An involuntary case may be commenced only under chapter 7 or 11 of this title, and only against a person, except a farmer, family farmer, or a corporation that is not a moneyed, business, or commercial corporation, that may be a debtor under the chapter under which such case is commenced.

APPENDIX B — OPINION OF THE UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE EIGHTH CIRCUIT FILED JANUARY 12, 2006

UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE EIGHTH CIRCUIT

No. 05-6013WM

In re: George L. Young and
Professional Business Services, Inc.,

Debtors.

U.S. Bank N.A., Alan Messinger, Grauf Cattle Farms, Inc., Jeffry T. Grauf, Mary Grauf, Jimmy Hammond, Dorothy Hammond, and United Producers, Inc.,

Plaintiffs-Appellees,

v.

George L. Young,

Defendant-Appellant.

Submitted: December 20, 2005
Filed: January 12, 2006

Before SCHERMER, MAHONEY, and McDONALD, Bankruptcy Judges.

McDONALD, Bankruptcy Judge.

Debtor George L. Young ("Young") appeals from the order of the bankruptcy court[1] granting several of Young's

1. The Honorable Jerry W. Venters, Chief Judge for United States Bankruptcy Court for the Western District of Missouri.

creditors (collectively "Creditors") motions for summary judgment. We affirm.

I

Young owned and operated Professional Business Services, Inc. ("PBS") (collectively "Debtors"). Several of Debtors' creditors filed an involuntary action against Debtors. Both Debtors filed an answer to the involuntary petitions stating that although they both were farmers, they consented to the bankruptcy court entering an order of relief. The bankruptcy court, therefore, entered an order of relief on August 21, 2001.

Debtors then attempted to convert the involuntary Chapter 7 cases to a proceeding under Chapter 11 pursuant to 11 U.S.C. § 706(a). One of the theories Debtors advanced in support of their motions to convert was that because they were both farmers, the bankruptcy court did not have subject-matter jurisdiction over the involuntary Chapter 7 cases under 11 U.S.C. § 303(a). The bankruptcy court rejected Debtors' argument and denied the motions to convert on November 15, 2001.

While Debtors' bankruptcy cases were proceeding, Young entered a plea of guilty in the United States District Court for Western District of Missouri to several counts of fraud relating to his management of PBS (the "Plea Agreement"). Young conceded in the Plea Agreement that he obtained credit from the Creditors by fraud. Creditors then filed several adversary proceedings against Young, arguing that Young's obligations to them were excepted from

discharge under 11 U.S.C. §§ 523(a)(2)(A), (a)(2)(B), (a)(4), and (a)(6).

Creditors eventually filed motions for summary judgment, asserting that Young was collaterally estopped by the Guilty Plea from arguing that he did not incur his obligations to them by way of fraud. Young responded to Creditors' motions by once again contending that because the bankruptcy court did not have subject-matter jurisdiction over the underlying involuntary case, it did not have jurisdiction over the adversary cases. Young did not argue in his response to the motions for summary judgment that he was not collaterally estopped by the Plea Agreement from asserting that his debts to Creditors were excepted from discharge under 11 U.S.C. §§ 523(a)(2)(A), (a)(2)(B), (a)(4), and (a)(6).

The bankruptcy court once again rejected Young's jurisdictional argument and granted Creditors' motions for summary judgment. This appeal follows.

II

Young identifies the following three orders in his notice of appeal: (1) the August 21, 2001 order of relief; (2) the November 11, 2001 order denying Debtors' motion to convert; and (3) the April 1, 2005 order granting Creditors' motions for summary on the their various adversary complaints. The first two orders are final orders in that they are a full adjudication of discrete issues within the bankruptcy case. *In re McGinnis*, 296 F.3d 730, 731 (8th Cir.2002) (*en banc*) (involuntary order for relief); *In re Copper*, 314

B.R. 628, 630 (6th Cir. BAP 2004) (order denying a motion to convert from a Chapter 7 proceeding). Thus, Young was required to file his notice of appeal with respect to those order within ten days after they were entered. Bankr.R. 8002(a). This requirement is jurisdictional and if the appellant fails to timely file his notice of appeal, the appellate court lacks subject-matter jurisdiction over the appeal. *In re Delta Eng'r Int'l.*, 270 F.3d 584, 586 (8th Cir.2001).

Young contends that this rule is inapplicable here because he is challenging the bankruptcy court's subject-matter jurisdiction over the adversary complaints. It is true that as a general matter, an appellant may raise the issue of whether the trial court had subject-matter jurisdiction over a case at any point, even on appeal. *Harmon Industries, Inc. v. Browner*, 191 F.3d 894, 903 (8th Cir.1999). The appellate court, however, must first have subject-matter jurisdiction over the appeal before it can review any claim, including the issue of whether the trial court had subject-matter jurisdiction over the underlying case. *Lang v. Lang (In re Lang)*, 414 F.3d 1191, 1195-96 (10th Cir.2005). Thus, an appellate court does not have subject-matter jurisdiction over an untimely appeal claiming that the trial court lacked subject-matter jurisdiction over the underlying case. *Id.*

Because Young failed to timely file his notice of appeal under Bankr.R. 8002(a) with respect to the order entering relief and the order denying Young's motion to convert, this Court does not have subject-matter jurisdiction to review those orders. Accordingly, this Court only has subject-matter jurisdiction to review the bankruptcy court's order granting Creditors' motions for summary judgment.

Appendix B

III

This court will affirm the bankruptcy court's order granting Creditors' motions for summary judgment if, after viewing the record in the light most favorable to Young, there are no genuine issues of material fact in dispute so that Creditors are entitled to judgment as a matter of law. *Maxfield v. Cintas Corp. No. 2*, 427 F.3d 544, 549-50 (8th Cir.2005). We will review the bankruptcy court's grant of the Creditors' motions for summary judgment *de novo. U.S. Fidelity & Guarantee Ins. Co. v. Commercial Union Midwest Ins.*, 430 F.3d 929, 933 (8th Cir.2005).

IV

The sole basis for Young's challenge to the bankruptcy court's order granting Creditors' motion for summary judgment is that the court lacked subject-matter jurisdiction over the underling involuntary Chapter 7 case. Young argues that because he was a farmer, 11 U.S.C. § 303(a) deprived the bankruptcy court of subject-matter jurisdiction over the underlying Chapter 7 case. This argument misconstrues the nature of section 303(a).

Section 303(a) recites in relevant part that "An involuntary case may be commenced . . . only against a person, except a farmer . . .". The Eighth Circuit has recently addressed the exact issue on appeal and has held that section 303(a) is not a grant of subject-matter jurisdiction to the bankruptcy court. *Marlar v. Williams (In re Marlar)*, 432 F.3d 813, 815 (8th Cir.2005). Rather, the bankruptcy court's subject-matter jurisdiction over any case under the Code is

conferred by 28 U.S.C. §§ 157 & 1334. *Id.* Section 303(a) simply defines the parties' substantive rights. *Id.* An alleged debtor's status as a farmer, therefore, is an affirmative defense to an involuntary petition under section 303(a). *Id.*

If the alleged debtor fails to assert his status as a farmers as a defense to an involuntary petition prior to the bankruptcy court entering an order for relief, then he waives that defense. *Id.*; 11 U.S.C. § 303(h). Accordingly, if an alleged debtor believes he is a farmer but nonetheless consents to bankruptcy court entering an order of relief on the involuntary petition, he waives his farmer defense to the involuntary petition. *In re McCloy*, 296 F.3d 370, 376 (5th Cir.2002).

Here, the record reveals that although Young stated that he was a farmer in his answers to the involuntary petition, he expressly consented to bankruptcy court issuing an order of relief. Young did not raise his farmer status as a defense to the involuntary petition until he filed his motion to convert his cases to a Chapter 11. Accordingly, after reviewing the record in the light most favorable to Young, there are no material facts in dispute that the bankruptcy court had subject-matter jurisdiction over the Creditors' adversary complaints. The bankruptcy court, therefore, did not err in granting Creditors' motions for summary judgment.

Appendix B

V

Young additionally contends that the bankruptcy court somehow violated his rights under the Fourth and Fifth Amendments. Young does not cite any specific action or order of the bankruptcy court that deprived him of his constitutional rights. The Court surmises that Young's argument is premised on the fact that once the bankruptcy court entered the order for relief, he was required to turnover his business records to the trustee. Therefore, Young appears to maintain that because the trustee turned those records over to the United States Attorney, the entire bankruptcy process deprived him of his rights against illegal searches and seizures and self-incrimination.

Young failed to present this issue to bankruptcy court. Young also did not advance this position at oral argument. Accordingly, Young failed to preserve this argument for appellate review and this Court will not review that argument in the first instance on appeal. *First Bank Investors' Trust v. Tarkio College (In re Tarkio College)*, 129 F.3d 471, 476-77 (8th Cir.1997).

Appendix B

VI

After reviewing the record in the light most favorable to Young, it is clear that Young explicitly consented to the bankruptcy court entering an order for relief on the involuntary petition. The bankruptcy court, therefore, had subject-matter jurisdiction over Young's involuntary Chapter 7 case and the Creditors' adversary complaints. Accordingly, there are no material facts in dispute so that the Creditors were entitled to judgment as a matter of law. Thus, the bankruptcy court did not err in granting the Creditors' motion for summary judgment.

Young additionally failed to preserve his constitutional argument for appellate review. Young also failed to timely appeal the bankruptcy court's order of relief on the involuntary petition and the order denying Young's motion to convert his case to a proceeding under Chapter 11. Accordingly, the judgment of the bankruptcy court is affirmed.

APPENDIX C — MEMORANDUM OPINION OF THE UNITED STATES BANRUPTCY COURT FOR THE WESTERN DISTRICT OF MISSOURI DATED APRIL 1, 2005

UNITED STATES BANRUPTCY COURT FOR THE WESTERN DISTRICT OF MISSOURI

No. 01-50704

In re:

GEORGE L. YOUNG,

Debtor.

Adv. No. 03-4301

U.S. BANK NATIONAL ASSOCIATION,

Plaintiff,

v.

GEORGE L. YOUNG,

Defendant.

Appendix C

Adv. No, 04-5280

ALAN MESSINGER, et al.,

Plaintiffs,

v.

GEORGE L. YOUNG,

Defendant.

Adv. No. 04-5311

GRAUF CATTLE FARMS, INC., JERRY T. GRAUF, and MARY GRAUF,

Plaintiffs,

v.

GEORGE L. YOUNG,

Defendant.

Appendix C

Adv. No. 04-5312

JIMMY HAMMOND and DOROTHY HAMMOND,

Plaintiffs,

v.

GEORGE L. YOUNG,

Defendant.

Adv. No. 04-5313

UNITED PRODUCERS, INC.,

Plaintiff,

v.

GEORGE L. YOUNG,

Defendant.

MEMORANDUM OPINION

These adversary proceedings are before the Court on motions for summary judgment filed by the Plaintiffs in each case. The Court has combined these cases for treatment in a single memorandum opinion because all of the Plaintiffs seek determinations that the debts owed to them are nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A),

(a)(2)(B), (a)(4), and (a)(6).[1] All of the Plaintiffs argue that they are entitled to summary judgment as a matter of law by application of collateral estoppel to a Plea Agreement and Judgment ("Criminal Judgment") entered in Debtor George L Young's criminal case adjudicated in the District Court for the Western District of Missouri.[2] The Debtor's consolidated response to the Plaintiffs' motions did not contest any of the Plaintiffs' factual or legal allegations; the only defense raised was that the adversary proceedings and the underlying bankruptcy case should be dismissed because the Court allegedly lacks jurisdiction.[3]

Upon review of the pleadings, Plea Agreement, Criminal Judgment, and relevant law, the Court determines that the debts (set forth in the Criminal Judgment) owed by the Debtor to the Plaintiffs are excepted from discharge pursuant to 11 U.S.C. § 523(a)(2)(A), (a)(2)(B), (a)(4), and (a)(6).[4]

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1. With the exception of United Producers, Inc., which did not seek a determination of discharge under § 523(a)(2)(B) or (a)(4).

2. Case No. 02-312-01-CR-W-FJG.

3. Ironically, if the Court were to accept the Debtor's argument (which it does not), the ultimate result might be even less advantageous for the Debtor, inasmuch as the dismissal of the bankruptcy would deprive Mr. Young of a discharge for *all* of his debts.

4. The following Plaintiffs in Adversary No. 04-5280 were not listed in the Criminal Judgment as having incurred damages or due restitution: Robert Brummer, CFZ Cattle, James Eggerling, Marcella Eggerling, Nancy Eggerling, Patricia Ciarrocchi Houchins, Johnson

(Cont'd)

Appendix C

II. JURISDICTION

The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334(a) and 157(a) and(b)(2)(I). The Debtor's challenge to this jurisdiction is without merit.

The Debtor attacks the Court's jurisdiction over this adversary proceeding by attacking its jurisdiction in the underlying bankruptcy case. Without jurisdiction in the bankruptcy case, the Court would, admittedly, be without jurisdiction over these adversary proceedings, but that is not the case. The Court obtained jurisdiction over the bankruptcy case when it entered an order of relief on August 22, 2001, immediately after the Debtor filed his answer to the involuntary petition stating Debtor stated that he consented to the order of relief. The Debtor now argues, however, that his consent to the order of relief is irrelevant because the Court lacked jurisdiction to enter that order, and a defendant cannot waive a subject matter jurisdictional defect.

This is a correct statement of law — that a defendant cannot confer subject matter jurisdiction on a court by consent — but it is inapplicable here. The alleged jurisdictional defect to which the Debtor refers is the prohibition in § 303(a) against commencing an involuntary petition against a farmer, and the Debtor maintains that he was a farmer at the time the order of relief was entered. Regardless of whether the Debtor

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(Cont'd)

Cattle Co., Dianae Kuchta, Oertwich Farms, Inc., and J.R. Pauley. In the absence of evidence establishing a debt owed to these Plaintiffs, the Court cannot grant summary judgment in their favor at this juncture.

was in fact a farmer when the order of relief was entered (and the Court harbors serious doubts that he was), cases interpreting 11 U.S.C. § 303(a) on this point have uniformly held that an objection to an involuntary petition on the grounds that the putative debtor is a farmer against whom an involuntary petition cannot be commenced is not jurisdictional but is, rather, an affirmative defense that can be waived.[5] And there is no doubt that the Debtor waived any objection to the order of relief on that or any other non-jurisdictional ground, both expressly — in his answer to the petition for relief — and implicitly, through his active participation in the bankruptcy process. Therefore, the Debtor's challenge to the Court's jurisdiction over these adversary proceedings and the underlying bankruptcy case is rejected.

We now turn to the merits of the motions.

III. STANDARD OF REVIEW

Summary judgment is appropriate when the matters presented to the Court "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."[6] The party moving for

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5. *See In the Matter of McCloy,* 296 F.3d 370, 375 (5th Cir.2002); *In re Frusher,* 124 B.R. 331, 333 (D.Kan.1991); *Potmesil v. Alexandria Production Credit Ass'n,* 42 B.R. 731, 731 (D.La.1984); *In re Johnson,* 13 B.R. 342, 346-47 (Bankr.D.Minn.1981).

6. Fed.R.Civ.P. 56(c); Fed. R. Bankr.P. 7056; *Celotex v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986).

summary judgment has the initial burden of proving that there is no genuine issue as to any material fact.[7] Once the moving party has met this initial burden of proof, the non-moving party must set forth specific facts sufficient to raise a genuine issue for trial and may not rest on its pleadings or mere assertions of disputed facts to defeat the motion.[8] The mere existence of a scintilla of evidence in support of the opposing party's position will not be sufficient to forestall summary judgment.[9] In ruling on a motion for summary judgment, "the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor."[10]

IV. BACKGROUND

Although the Court's file and the record in this case are replete with evidence of the Debtor's fraudulent actions, the instant motions rely entirely on the facts recited in the Criminal Judgment and Plea Agreement. The Criminal Judgment provides a list of the "Total Loss Amount &

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7. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 161, 90 S.Ct. 1598, 1611, 26 L.Ed.2d 142 (1970).

8. *Matsushita Electric Industrial Co., Ltd., v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986) (stating that the party opposing the motion "must do more than simply show that there is some metaphysical doubt as to the material facts").

9. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2505, 2512, 91 L.Ed.2d 202 (1986).

10. *Id.* at 255, 106 S.Ct. 2505.

Restitution Ordered" for the victims of the Debtor's criminal conduct, and the Court accepts that list as evidence of the debt owed to each of the Plaintiffs appearing on the list.[11] The facts set forth in the Plea Agreement are reproduced (verbatim) below:

> Between late 1988 to on or about July 25, 2001, the defendant, acting together and aiding and abetting his business partner, Kathleen I. McConnell, knowingly and intentionally and with the intent to defraud and obtain money made material false and fraudulent representations and promises to financial institutions such as First National Bank of Omaha and U.S. Bank, to individual clients of their businesses, and to business associates such as MFA Livestock Association:
>
> * the defendant represented that the livestock operations companies had the expertise, financial capacity, and industry contacts that consistently resulted in profits for clients when, intruth and fact, George L. Young knew full well that the livestock operations companies were not generating sufficient income to pay their obligations;
>
> * the defendant paid clients rates of return far above industry averages when, in truth and

11. The Plea Agreement also contained a stipulation that the loss suffered by the victims of the Debtor's conduct is approximately $160,000,000, which amount includes the loss suffered by the Plaintiffs in these cases.

fact, the rates of return paid to clients were not generated by the livestock operations;

* the defendant falsely represented that the inventory of cattle was far higher than it actually was;

* the defendant falsely represented that funds received from clients would be used to purchase cattle and have them fattened for market when, in truth and fact, the money was actually used to cover cash shortfalls, business expenses, and to pay other clients whose cattle had supposedly matured and been sold;

* the defendant falsely represented on checks drawn on an account owned by MFA Livestock Association that the funds were being used to purchase cattle when, in truth and fact, no cattle were being purchased and the funds were actually used to pay clients for their cattle that had purportedly been sold, but which often never existed;

* the defendant made false representations and concealed material facts from financial institutions such as First National Bank of Omaha and U.S. Bank, by falsely representing in financial documents submitted to those financial institutions that cattle inventories claimed by companies owned by George L. Young and Kathleen I. McConnell, were much higher than

they actually were when, in truth and in fact, a substantial portion of the cattle represented as inventory had never been purchased; and

* in furtherance of his scheme and artifice to defraud, during the period of the conspiracy, the defendant falsely represented to clients that cattle they were inspecting in feed lots belonged to the particular client when, in truth and fact, the defendant knew that he was showing the same herds of cattle over and over to different clients because he had not purchased all of the cattle he had received money for. (Plea Agreement, Case No. 02-312-01-CR-W-FJG)

V. DISCUSSION

The Plaintiffs contend that they are entitled to summary judgment as a matter of law because the facts stated above establish grounds for a determination of nondischargeability under 11 U.S.C. § 523(a)(2)(A), (a)(2)(B), (a)(4), and (a)(6). Under the doctrine of collateral estoppel, they assert, the Debtor cannot re-litigate those facts. The Debtor appears to have conceded this point, inasmuch as the Debtor's only objection to the Plaintiffs' summary judgment motions concerned the jurisdiction of the court.

In the absence of a substantive (*i.e.*, non-jurisdictional) challenge to the Plaintiffs' motions, the Court does not need to engage in a lengthy discussion regarding the application of collateral estoppel principles to the Plea Agreement and Criminal Judgment to establish the elements of

§ 523(a)(2)(A), (a)(2)(B), (a)(4), and (a)(6). It suffices that upon review of the Plea Agreement and Criminal Judgment, the Court finds that the doctrine of collateral estoppel applies to the findings therein,[12] and those findings warrant entry of summary judgment as a matter of law in favor of the Plaintiffs under § 523(a)(2)(A), (a)(2)(B), (a)(4), and (a)(6).

V. CONCLUSION

For the reasons stated above, the Court will grant summary judgment in favor of the Plaintiffs on all counts and claims alleged. This opinion constitutes the Court's findings of fact and conclusions of law. A separate order will be entered in each adversary proceeding pursuant to Fed. R. Bankr. P. 9021.

ENTERED this 1st day of April 2005.

/s/ Jerry W. Venters
HONORABLE JERRY W. VENTERS
UNITED STATES BANKRUPTCY JUDGE

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12. The four requirements of collateral estoppel are: (1) the issues in the present case and the prior adjudication must be identical; (2) the judgment in the prior adjudication must be on the merits; (3) the party against whom collateral estoppel is asserted must have been the same party or in privity with a party in the prior adjudication; and (4) the party against whom collateral estoppel is asserted must have had a full and fair opportunity to litigate the issue in the prior suit. *In re Scarborough,* 171 F.3d 638, 641-42 (8th Cir.1999) (citing *State v. Nunley,* 923 S.W.2d 911, 922 (Mo.1996)).

APPENDIX D — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION DATED NOVEMBER 15, 2001

IN THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

Case No. 01-50704-JWV

In re:

GEORGE L. YOUNG,

Debtor.

Case No. 01-50707-JWV

In re:

PROFESSIONAL BUSINESS SERVICES, INC.,

Debtor.

MEMORANDUM OPINION AND ORDER

On August 20, 2001, several creditors filed Involuntary Petitions pursuant to 11 U.S.C. § 303 seeking to have George L. Young, an individual ("Young"), and Professional Business Services, Inc., ("PBS") a corporation involved in management of Young's cattle business, placed in Chapter 7 bankruptcy proceedings. On August 22, 2001, Young and PBS, by counsel, filed Answers in which they consented to

the entry of an Order for Relief, and that Order was entered on the same day. Now, the Debtors have filed Motions to Convert ("Motions") both cases to Chapter 11, and that is the matter now before the Court.

The Court held a combined hearing on the Motions on October 26, 2001. The Motion to convert the Young case was opposed by Robert A. Pummill, the Trustee in the Young case; David C. Stover ("Stover"), the Trustee in the related case of United Livestock Services, Inc. ("United Livestock;" Case No. 01-44229); the United States Trustee ("UST"); United Producers, Inc., one of the owners of United Livestock, and a creditor or potential creditor; and First National Bank of Omaha, a creditor. The Motion to convert the PBS case was opposed by Stover; the UST; First National Bank of Omaha; and Erlene W. Krigel ("Krigel"), the Trustee in the PBS case. Counsel for the various parties made oral arguments, and Krigel presented evidence in support of her opposition to the PBS Motion. The Court then took the matter under advisement. The Court has now reviewed the arguments, has reviewed the briefs and suggestions filed, has conducted its own independent research of the issues, and is now ready to rule.

For the reasons set out herein, the Court will deny the Motions in both cases.[1]

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1. This Memorandum Opinion and Order constitutes the Court's Findings of Fact and Conclusions of Law pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure.

Appendix D

FACTUAL BACKGROUND

Some review of the background of these cases is necessary to an understanding of the present issues and the Court's ruling.

Young, a resident of Grant City, in northwest Missouri, had been engaged in extensive cattle operations in Missouri, Iowa, and Nebraska prior to August 10, 2001. Management of the somewhat dispersed operations was conducted by PBS, which is owned by Young and Kathleen McConnell ("McConnell"). On August 10, 2001, Young apparently notified U.S. Bank National Association ("U.S. Bank"), one of his major creditors, that he was unable to continue the operation of his cattle business and could not care for the cattle he owned or was managing for others, and suggested that the Bank should make arrangements for the care of the cattle.[2] Early on in these cases, the Trustees in the Young and PBS cases filed various pleadings in which they alleged that, on their best information and belief, Young had sold interests in approximately 210,000 head of cattle, but that the Trustees were able to locate only about 16,400 cattle, spread out on 43 feedlots and farms in Missouri, Iowa, and Nebraska.

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2. Although the Court has held numerous hearings in these cases, the letter containing this notification has never been placed in evidence. However, attorneys for various parties have repeatedly alluded to it, without objection, and the Court will accept that such a letter was sent to U.S. Bank (and perhaps other interested parties). Regardless of how the cessation of business was handled, there is no dispute that Young ceased caring for all of the cattle on August 10, 2001.

Appendix D

Since the filing of these cases,[3] the Debtors — Young and PBS — have filed their bankruptcy schedules, and the schedules indicate that Young had sold interests in 343,937 head of cattle — *not* 210,000, as the Trustees believed — and that there were only 28,784 cattle in existence.[4] Also since the filing of these cases, the Court has entered various Orders to authorize the sale of fat cattle and feeder cattle by the Trustees and has approved bidding procedures for the sale of the cattle, real estate, and equipment owned by Rio Baca and Rio Timba. In addition, the Court has entered Orders in the Young, PBS, and United Livestock cases approving procedures for the filing of ownership claims as to the livestock and establishing procedures for all parties to obtain access to the voluminous paper and computer records that have been under the control of the Federal Bureau of Investigation ("FBI").

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3. An Involuntary Petition was filed against United Livestock on August 28, 2001, and an Order for Relief was entered on September 25, 2001; Stover was appointed as the Interim Trustee on an emergency basis prior to the entry of the Order for Relief. Two other related cases — Rio Baca, Inc., ("Rio Baca") and Rio Timba, Inc. ("Rio Timba") — were transferred from the Bankruptcy Court for the Southern District of Iowa to this Court on September 13, 2001, and September 19, 2001, respectively. The Rio Baca and Rio Timba cases were originally filed as voluntary Chapter 11 proceedings in Iowa. This Court entered an Order on November 1, 2001, converting both of these cases to Chapter 7.

4. The schedules were not signed by Young or McConnell, however, apparently because of their concerns (and their lawyers' concerns) as to possible self-incrimination.

Appendix D

The parties have stipulated that the Debtors have represented to the Court and creditors that the FBI is conducting an investigation into the activities of Young and McConnell in connection with their cattle operations.

On September 24, 2001, Robert M. Cook ("Cook"), counsel for Young and PBS, announced in open Court that he was invoking the Debtors' "absolute right" to convert the Young and PBS cases to Chapter 11, pursuant to 11 U.S.C. § 706(a), and Cook has since filed various pleadings indicating (at least in the captions) that the cases were converted to Chapter 11 on that date. However, the Court directed Cook to file a written Motion to Convert and to give notice of the Motions to all creditors and parties in interest, and the Court scheduled and noticed a hearing on the Motions for October 26, 2001. As previously noted, that hearing was held on October 26, at which time the Court received evidence and heard the arguments of counsel.

At that hearing, Cook informed the Court in argument that the Debtors do not wish to have the cases converted so that they may become the debtors-in-possession and attempt to reorganize, and that they would consent to the immediate appointment of Chapter 11 trustees. Rather, the Debtors want the opportunity to present a plan of distribution for the assets. Cook informed the Court that Young and McConnell would not be willing to testify at any hearings, such as a § 341 meeting of creditors, because of the ongoing criminal investigation into their activities. And, as previously noted in footnote 4, Young and McConnell have declined to sign their bankruptcy schedules under penalty of perjury, apparently because of fears of possible self-incrimination.

The only witness to testify at the hearing was Krigel, the PBS Trustee, who testified that she has uncovered various accounts and assets that were not disclosed by the Debtors on their schedules. Krigel stated that records produced by the Bank of America indicated deposits and transfers in the Debtors' accounts exceeding $10 million in the first 10 days of August, before Young ceased his operations. Krigel also noted that PBS had transferred — perhaps improperly — $100,000 of its funds to the criminal defense attorney for McConnell.

DISCUSSION

It is the Debtors' position, as enunciated by Cook, that the Debtors have an absolute right to convert these Chapter 7 proceedings to Chapter 11, on the basis of the provision in 11 U.S.C. § 706(a) that "[t]he debtor may convert a case under this chapter to a case under chapter 11 at any time." In his Motions, Cook quotes the Historical and Revision Notes to § 706(a) to the effect that "Subsection (a) . . . gives the debtor the one-time absolute right of conversion of a liquidation case to a reorganization . . . case . . . The policy . . . is that the debtor should always be given the opportunity to repay his debts and waiver of the right to convert a case is unenforceable."

The opponents assert that, while the Debtors may have a "presumptive right" to convert to Chapter 11, they have no absolute right to convert, and that there are exceptional circumstances in this case that overcome any "presumptive right" to convert. They also argue that a conversion to Chapter 11 and the administration of a Chapter 11 case would add

major expenses to the cases, such as for numerous committees and the UST's statutory fees. They further argue that, because of the pending threat of criminal prosecution, Young and McConnell will not be able to carry out their fiduciary duties under the Bankruptcy Code, and that their refusal to cooperate and perform their duties will impede the efficient administration of the estates. Finally, Krigel suggests that the Debtors are not entitled to an order of conversion because of their apparent concealment or diversion of assets.

As a preliminary matter, the Court will address the procedural issue of whether a debtor may effect an "automatic" conversion from Chapter 7 to Chapter 11 simply by announcing the intention to convert in open court and by filing a Notice of Conversion. That is the procedure Cook has attempted to follow in these cases. However, it is not the proper procedure.

Rule 1017(f)(2) of the Federal Rules of Bankruptcy Procedure provides that a conversion or dismissal under sections 706(a), 1112(a), 1208(b), or 1307(b) shall be on a motion filed and served as required by Rule 9013. Fed. R. Bank. P. 1017(f)(2). Rule 9013 requires that "[e]very written motion other than one which may be considered ex parte shall be served by the moving party . . . on those entities specified by these rules or . . . [on] the entities the court directs." Fed. R. Bank. P. 9013. Rule 2002(a)(4) requires that all interested parties be given 20 days' written notice of the hearing on conversion of a Chapter 7 case to any other chapter. Fed. R. Bank. P. 2002(a)(4). Taken together, these Rules make it clear that the mere filing of a notice of conversion is insufficient to effect a conversion and that an

order is necessary; otherwise, the provisions for the filing of a motion and for notice and a hearing would be meaningless. *See In re Krishnaya*, 263 B.R. 63, 65 (Bankr.S.D.N.Y.2001) ("It is plain, from Rule 1017(f), that mere notice of conversion is insufficient . . ."); *In re Dipalma*, 94 B.R. 546, 549 (Bankr.N.D.Ill.1988) ("The rule makers certainly intended that conversion of a Chapter 7 case be accomplished by the entry of an order, not the mere service of notice."); *Calder v. Job (In re Calder)*, 973 F.2d 862, 867 (10th Cir.1992) (Conversion is only effective upon entry of a conversion order by the Court.).[5] In this case, the "notice of conversion" which Cook announced in open court on September 24, 2001 and the filing of Notices of Conversion on September 25, 2001, were ineffective to convert these cases to Chapter 11, and the Notice of Conversion subsequently filed in each case will be stricken from the record. *In re Latin Investment Corporation*, 125 B.R. 327, 327-28 (Bankr.D.C.1991). Further, references by the Debtors' counsel in subsequent pleadings and captions to the date the cases were converted to Chapter 11 are improper and inaccurate and should be disregarded.

We turn, then, to the substantive issue — whether the Debtors have an absolute right under § 706(a) to convert these cases to Chapter 11, or whether, alternatively, conversion from Chapter 7 is a presumptive right that may be denied.

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5. This is in contrast to the procedure for conversion of a case *from* Chapter 12 or 13. Rule 1017(f)(3) provides that a Chapter 12 or Chapter 13 case "shall be converted *without court order* when the debtor files a notice of conversion under §§ 1208(a) or 1307(a)." Fed. R. Bank. P. 1017(f)(3),(emphasis added).

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At first glance, a reading of § 706(a) and the legislative history would seem to support the Debtors' argument in these cases that a debtor does, indeed, have an absolute, one-time right to convert a case from Chapter 7 to one of the reorganization chapters.[6] The Court does not agree with that argument.

Section 706(a) states:

> (a) The debtor may convert a case under this chapter to a case under chapter 11, 12, or 13 of this title at any time, if the case has not been converted under section 1112, 1208, or 1307 of this title. Any waiver of the right to convert a case under this subsection is unenforceable.

11 U.S.C. § 706(a).

The language that is often quoted as providing support for an absolute right of conversion is found not in the statute itself but in the legislative history:

> Subsection (a) of this section gives the debtor one absolute right of conversion of a liquidation case to a reorganization or individual repayment plan case.

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6. Some of the earlier cases so holding include *In re Mead*, 28 B.R. 1000, 1002 (E.D.Pa.1983); *In re Sobin*, 99 B.R. 483, 484 (Bankr.M.D.Fla.1989); *Matter of Kleber*, 81 B.R. 726, 727 (Bankr.N.D.Ga.1987); *In re Easley*, 72 B.R. 948, 951 (Bankr.M.D.Tenn.1987); *In re Caldwell*, 67 B.R. 296, 300-01 (Bankr.E.D.Tenn.1986); *Street v. Lawson* (*In re Street*), 55 B.R. 763, 765 (9th Cir. BAP 1985); *Matter of Jennings*, 31 B.R. 378, 380 (Bankr.S.D.Ohio 1983).

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> If the case has already once been converted from chapter 11 or 13 to chapter 7, then the debtor does not have that right. The policy of the provision is that the debtor should always be given the opportunity to repay his debts.

S.Rep. No. 989, 95th Cong.2d Sees. 380, reprinted in 1978 U.S.C.C.A.N. 5787, 5880; H.R.Rep. No. 595, 95th Cong.2d Sess. 94, reprinted in, 1978 U.S.C.C.A.N. 5787, 5963, 6336.

A careful reading of the statute, its legislative history, and other provisions of the Bankruptcy Code does not, however, support the conclusion that a debtor has an absolute right to convert a Chapter 7 case. First, in analyzing a statute, the court must consider the actual words, and if the intent of Congress is clear from the plain language of the provision then that is the end of the inquiry; the court is not obligated to investigate legislative history unless the language of the statute is ambiguous. *See Arkansas AFL-CIO v. F.C.C.*, 11 F.3d 1430, 1440 (8th Cir.1993). "Where . . . the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.' " *United States v. Ron Pair Enter., Inc.*, 489 U.S. 235, 241, 109 S.Ct. 1026, 1030, 103 L.Ed.2d 290 (1989). There can be no quarrel that § 706(a) accords a debtor a right to convert a Chapter 7 case. *In re Marcakis*, 254 B.R. 77, 79 (Bankr.E.D.N.Y.2000). Section 706(a) states that a debtor may convert a Chapter 7 case to another chapter "at any time," if the case has not previously been converted. The words "at any time" quite obviously mean that the debtor may seek a conversion at any time in the life of the case. However, "at any time" is not the same as and does not mean "regardless of circumstances." *In re Starkey*, 179 B.R. 687, 692 (Bankr.N.D.Okla.1995).

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Section 706(a) must be read in conjunction with the Rules, which require the filing of a motion, notice to creditors, and a hearing before an order of conversion is entered. See Fed. R. Bank. P. 1017(f)(2), 9013, and 2002(a)(4), and the discussion of their provisions *supra*. If the right to convert were absolute, there would be no need to file a motion, notify creditors, and have a hearing; those procedures and the Rules would be useless and meaningless. *Krishnaya*, 263 B.R. at 65. The Rules lay out the procedures to be followed to implement a conversion. *Calder*, 973 F.2d at 867. The Court does not believe that the drafters of the Rules would have included those provisions in the Rules, or that the Supreme Court would have adopted those Rules, if the Rules were to have no purpose or meaning or that they were contrary to the statute. If the debtor has an absolute right to convert a Chapter 7 case, regardless of the circumstances, there would be no need for these rules and the debtor could simply follow the notice procedure that was initially attempted by the Debtors' counsel in these cases. As previously noted, the Court refuses to believe that that is the proper procedure or what the statute and the Rules require.

The notion that a debtor has an "absolute right" to convert arises from the use of that phrase in the legislative history (quoted above) rather than from the language of the statute itself. This Court will not read that phrase literally into the statute; it is not warranted and leads to an erroneous conclusion.[7] Without argument, the legislative history clearly

7. "The legislative committee's choice of 'absolute' in regard to Section 706(a) is infelicitous to say the least and has spawned an interpretation of the statute couched in hyperbolic terms very much (Cont'd)

evidences Congress' intent that debtors be given an opportunity to repay their debts, but that right, like many other rights accorded debtors in the Bankruptcy Code, is not absolute and unfettered.[8] In this Court's view, a debtor has a presumptive right to convert a Chapter 7 case to a reorganization case, but that right is not absolute.[9]

This appears to be a case of first impression in this District, and the Eighth Circuit Court of Appeals has not spoken definitively on the issue. The courts that have wrestled with the issue are divided. Most of the earlier cases decided after enactment of the Bankruptcy Code in 1978 held that a debtor had the absolute right to convert, and those are the cases relied on by the Debtors here, as would be expected. (See footnote 6.) However, the later cases — and the better

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(Cont'd)

at odds with the equitable considerations of eligibility, good faith and appropriateness which are inherent in a court's review of the facts and circumstances in any request brought on by motion." *Marcakis*, 254 B.R. at 79.

8. "The words 'at any time' refer literally to any stage in the progress of a case, not to any conditions which may develop during that progress, especially in an abnormal and abusive case." *Starkey*, 179 B.R. at 692.

9. Virtually all of the cases discussing § 706(a) point out that the underlying legislative policy of permitting debtors to repay their debts is central to the right to convert. *Martin*, 880 F.2d at 859; *Finney v. Smith* (*In re Finney*), 141 B.R. 94, 97 (E.D.Va.1992); *Street v. Lawson* (*In re Street*), 55 B.R. 763, 765 (9th Cir. BAP 1985); *In re Spencer*, 137 B.R. 506, 511 (Bankr.N.D.Okla.1992); *In re Kleber*, 81 B.R. 726, 727 (Bankr.N.D.Ga.1987); *In re Jennings*, 31 B.R. 378, 380-81 (Bankr.S.D.Ohio 1983).

reasoned ones, in this Court's opinion — have variously held that the court has discretion to deny conversion when "extreme circumstances" amounting to bad faith are shown, where the conversion would amount to an abuse of the bankruptcy process, or where the conversion would violate the purposes and policy of the Bankruptcy Code.[10]

The leading Eighth Circuit case on the issue is *Martin v. Cox*, 213 B.R. 571 (E.D.Ark.1996), *aff'd mem.*, 116 F.3d 480 (8th Cir.1997). In that case, the District Court upheld the Bankruptcy Court's denial of the debtor's motion to convert from Chapter 7 to Chapter 13 where "extreme circumstances" amounting to bad faith were shown. Those "extreme circumstances" included the debtor's falsifying documents, failing to list significant assets, omitting pertinent information on schedules, filing false tax returns, and making false representations to another bankruptcy court. *Martin*, 213 B.R. at 572. In upholding the Bankruptcy Court's ruling, the District Court said it appeared that the debtor "has grossly misused the bankruptcy process and fraudulently misrepresented crucial facts in her bankruptcy petition." The Court found that this "flagrant conduct" amounted to "extreme circumstances" warranting denial of the debtor's motion to convert to Chapter 13. *Martin*, 213 B.R. at 573.

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10. While most of the reported cases deal with the question of conversion from Chapter 7 to Chapter 13, the chapter that is limited to individuals, the principles and rationale are the same in cases where the conversion is requested to Chapter 11. Both Chapter 11 and Chapter 13 are designed to allow debtors to reorganize their financial affairs and pay their creditors, in whole or in part.

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The Court of Appeals for the Eighth Circuit affirmed the District Court in a memorandum order, without opinion.[11]

Martin appears to express the position of the majority of courts today. Other courts interpreting § 706(a) have likewise found that denial of the right to convert is warranted when "extreme circumstances" are present. "Extreme circumstances" may include abuse of the bankruptcy process, bad faith, or other gross inequity. *See, e.g., Matter of Martin*, 880 F.2d 857 (5th Cir.1989); *In re Spencer*, 137 B.R. 506 (Bankr.N.D.Okla.1992); *In re Jeffrey*, 176 B.R. 4 (Bankr.D. Mass.1994); *In re Krishnaya*, 263 B.R. 63 (Bankr.S.D.N.Y. 2001); *In re Pakuris*, 262 B.R. 330 (Bankr.E.D.Pa.2001); *In re Kelly*, 261 B.R. 785 (Bankr.M.D.Fla.2001); *In re Marcakis*, 254 B.R. 77 (Bankr.E.D.N.Y.2000); *In re Dews*, 243 B.R. 337 (Bankr.S.D.Ohio 1999); and *Kuntz v. Shambam (In re Kuntz)*, 233 B.R. 580 (1st Cir. BAP 1999).

Other courts have found that conversion should be denied when there is no purpose to be served by the conversion. For example, denial of conversion is appropriate if it is demonstrably clear that the debtor will not be able to propose a feasible plan and conversion would thus be an "exercise in futility," *In re Lilley*, 29 B.R. 442, 443 (1st Cir. BAP 1983), or if the debtor will not obtain any relief as a result of the order, *In re Safley*, 132 B.R. 397, 399-400 (Bankr.E.D. Ark.1991), *In re Jones*, 111 B.R. 674, 680 (Bankr.E.D. Tenn.1990).

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11. In *In re Little*, 253 B.R. 427 (8th Cir. BAP 2000), the Bankruptcy Appellate Panel for the Eighth Circuit did not decide whether the right to convert from Chapter 7 to Chapter 13 is absolute, but did note that the "case authority is divided on this issue." *Little*, 253 B.R. at 429, n. 3.

Conversion may likewise be denied to prevent an abuse of the bankruptcy system. *Pakuris*, 262 B.R. at 338. All courts possess the inherent power to protect their jurisdiction and process from abuse. *In re Higginbotham*, 111 B.R. 955, 961 (Bankr.N.D.Okla.1990). "[C]ourts of equity are empowered (and, in the nature of their jurisdiction, required) to see to it that their process is used in an equitable manner." *Spencer*, 137 B.R. at 511. "[W]hile the right to convert is presumptive and nearly absolute, a bankruptcy court . . . still must determine if the conversion is appropriate pursuant to the overall purpose and policy of the Bankruptcy Code." *Krishnaya*, 263 B.R. at 69 (internal quotation marks and citation omitted). In summary, the Court has the authority, in the exercise of its discretion, to deny the Motions to Convert filed in these cases.[12]

Having concluded that the Debtors do not have an absolute right to convert these cases to Chapter 11 and having further concluded that the Court has the discretionary authority to deny their requests to convert, the question then becomes what factors the Court should employ in determining whether the Motions in these cases should be granted or denied. The Court finds considerable assistance in that regard in *In re Pakuris*, 262 B.R. 330 (Bankr.E.D.Pa.2001), and *In re Tardiff*, 145 B.R. 357 (Bankr.D.Me.1992), in which the bankruptcy courts enumerated a number of factors that may be considered in

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12. Some of the courts that have denied conversion have relied on the Bankruptcy Court's equitable powers in 11 U.S.C. § 105(a), which authorizes the Court to "issue any order...that is necessary or appropriate to carry out the provisions of this title [Title 11]." 11 U.S.C. § 105(a).

determining whether to allow conversion of a Chapter 7 case to Chapter 13. These factors are equally applicable to the pending Motions to convert the Young and PBS cases to Chapter 11, inasmuch as both Chapter 11 and Chapter 13 are reorganization chapters. Those factors may be synthesized as follows:

> (1) Whether the conversion is sought in good faith;
>
> (2) Whether the debtor can propose a confirmable plan;
>
> (3) The impact on the debtor of denying conversion weighed against the prejudice to creditors caused by allowing conversion;
>
> (4) The effect of conversion on the efficient administration of the bankruptcy estate, including the likelihood of reconversion to Chapter 7;
>
> (5) Whether conversion would further abuses of the bankruptcy process and would serve to pervert, rather than implement, congressional policy.

Pakuris, 262 B.R. at 335-36; *Tardiff*, 145 B.R. at 360-61.

The Court believes that these enumerated factors provide a good, basic guideline of the factors that should be evaluated in ruling on a motion to convert, and therefore the Court will adopt and utilize them in this instance. Applying those factors to the facts in these cases, it becomes clear that conversion of these cases to Chapter 11 should be denied.

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First, the conversion of these cases is not being sought in good faith. The purpose of Chapter 11 is to enable debtors to rehabilitate their businesses, *In re C-TC 9th Ave. P'ship*, 113 F.3d 1304, 1308 (2nd Cir.1997), but Cook, the Debtors' counsel, concedes that all of the assets of the estates will be sold and has acknowledged in open court that the Debtors do not wish to be the debtor-in-possession and would consent to the immediate appointment of a Chapter 11 trustee if the cases were converted. In short, the Debtors do not wish to convert the cases so that they can operate and rehabilitate their businesses. According to Cook, the sole purpose for conversion would be to allow the Debtors to propose a plan, not of reorganization, but of distribution of the assets of the bankruptcy estates. From this, the Court can only conclude that the Debtors wish to propose a plan that would differ from the liquidation provisions and procedures set out in the Bankruptcy Code. Since the Debtors concede that they will not be able to operate their businesses and will not be able to reorganize, there would be no purpose to be served by putting the Debtors in Chapter 11 and therefore any request to convert these Chapter 7 cases to Chapter 11 cannot be proposed in good faith.

Additionally, the Debtors have not exhibited any good faith in these proceedings thus far. They have not performed the duties required of them under 11 U.S.C. § 521, and their counsel has indicated that they will not testify or otherwise cooperate with the Trustees so long as they are threatened with criminal prosecutions for their business activities. Although the Court has conducted numerous hearings in these cases, Young and McConnell have never appeared to testify or offer evidence that would assist the Trustees and the Court

in the administration of these cases. It is hard to imagine any debtors who have exhibited less good faith and who are less deserving of favorable consideration. There is no reason to think they would change their stripes if they were allowed to convert to Chapter 11.

Second, the Debtors will not be able to propose a confirmable plan of reorganization, which is, again, the ultimate aim of Chapter 11. As just noted, the Debtors' counsel concedes that the Debtors will not be able to operate and rehabilitate their businesses and that, instead, all of their assets will be liquidated. One of the grounds for denying confirmation of a plan in a Chapter 11 case is that confirmation of the plan is likely to be followed by liquidation (unless liquidation is proposed in the plan). 11 U.S.C. § 1129(a)(11). Under the circumstances, the only feasible plans that could be proposed by the Debtors would be plans for the liquidation of their assets and distribution of the resulting proceeds to their creditors in accordance with the provisions of the Bankruptcy Code. Presuming, for the sake of discussion, that the Debtors would intend to propose a plan of distribution that would differ from the distribution provisions of the Code, it is highly unlikely that such a plan would ever gain the votes necessary for confirmation, particularly in view of the competing interests of the banks, investors, and other creditors in these cases. Conversion should not be permitted where the debtor is demonstrably incapable of proposing a feasible plan, *Lilley*, 29 B.R. at 443, or where it serves no point, *Tardiff*, 145 B.R. at 360.

Third, the prejudice to creditors of allowing the requested conversion would far outweigh the benefits of conversion to

the Debtors. In reality, a conversion to Chapter 11 would produce no benefits that the Debtors do not already have, particularly if the sole purpose of conversion is to allow the Debtors to propose a plan of distribution. The Debtors do not have to be in Chapter 11 to have a voice in the distribution of the assets of the estates. If they disagree with the Trustees' proposed Chapter 7 distributions, they may object to them and the Court will hear those objections. On the other hand, a conversion at this stage of the proceedings — even though it is relatively early in the cases — would cause significant detriment to the creditors. According to the Debtors' schedules, there may be as many as 28,000 cattle of various ages and stages of production under the care, custody, and/or ownership of the Debtors. However, the Debtors have apparently sold interests in more than 343,000 cattle, meaning that the Debtors are short some 315,000 cattle. The Court has approved post-petition borrowing by the Trustees of up to $1,275,000 in these cases to enable them to feed and maintain the cattle until the cattle are ready for marketing, and the Court has entered various orders to allow the sale of most of the cattle. A conversion of the cases at this point would upset the orderly liquidation of the cattle (and, perhaps, other assets, such as real property and equipment), and would call into question the continued validity of the orders previously entered by the Court, even if the same trustees were appointed as the Chapter 11 trustees. This could only generate confusion and uncertainty. More importantly, a conversion would almost certainly delay any eventual distributions to creditors. Additionally, as the U.S. Trustee points out, conversion would greatly increase the costs of administration because substantial costs would be incurred for creditors' committees and the U.S. Trustee's statutory

fees in Chapter 11 cases. The funds for these added expenses would, in the end, come out of the pockets of the creditors, who, it appears, already stand to lose millions of dollars in these cases.

Fourth, conversion would unnecessarily complicate and hinder the administration of these estates, for many of the reasons just stated. It would cast doubt over the continued effectiveness of many of the orders previously entered by the Court. It would add layers of administrative procedures and costs. It would delay final administration of the estates because of the necessity of balloting and conducting hearings on plans that would have little likelihood of gaining approval over creditors' objections. In addition, the administration of all five of these related cases would be further complicated by conversion because the Rio Baca and Rio Timba cases have recently been converted from Chapter 11 to Chapter 7 and are being administered as Chapter 7 cases. It would unnecessarily complicate these proceedings and confuse the creditors to now convert the Young and PBS cases to Chapter 11, particularly when they have no legitimate prospects for reorganization. Moreover, it is likely that a conversion to Chapter 11 would be followed by an immediate reconversion to Chapter 7, inasmuch as the U.S. Trustee has already filed an anticipatory motion for reconversion and there are grounds for reconversion. One of the grounds for conversion or dismissal of a Chapter 11 case is the inability of a debtor to effectuate a plan (usually, of reorganization), 11 U.S.C. § 1112(b)(2), and another is continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation, 11 U.S.C. § 1112(b)(1). In these cases, the Debtors have conceded that they will not be able to

reorganize, and thus the grounds already exist for reconversion. Granting the Debtors' Motions would clearly be an exercise in futility. *Safley*, 132 B.R. at 401.[13]

Lastly, granting the Debtors' Motions to Convert would further abuses of the bankruptcy system and would pervert congressional policy as contained in the Bankruptcy Code. The Debtors in these cases have admitted that the FBI is conducting an investigation into their activities. Young and McConnell, the principals in the PBS case, and Young as an individual debtor have refused to sign verified schedules and statements of affairs in these cases for fear they will incriminate themselves, and counsel has advised the Court and creditors that Young and McConnell will refuse to testify at any § 341 meetings. While Young and McConnell have apparently not interfered with the Trustees in the copying and organizing of the Debtors' records, they have been unable — if not unwilling — to assist the Trustees in obtaining those records and making them available to interested parties.[14]

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13. There are cases suggesting that a case may be converted to a reorganization chapter as a matter "of right," and then instantaneously "reconverted" to Chapter 7. *See, e.g., Finney v. Smith (In re Finney)*, 141 B.R. at 97, *aff'd and remanded*, 992 F.2d 43 (4th Cir.1993)(remanded for hearing on "objective futility" of a Chapter 11 reorganization); *Latin Investment Corp.*, 125 B.R. at 328. As the Court in *Tardiff* observes: "Such an exercise is pointless and exalts form over substance. Circumstances which justify reconversion are adequate to deny conversion in the first place." *Tardiff*, 145 B.R. at 360, n. 14.

14. The Trustees and creditors have represented to the Court that there are more than 200,000 pages of paper records and an

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Young and McConnell have not assisted the Trustees in the administration of the estates, and the statements of the Debtors' counsel clearly indicate that Young and McConnell do not intend to assist the Trustees so long as possible criminal charges are hanging over their heads.[15] It is abundantly clear that Young and McConnell cannot carry out the duties of debtors as required under 11 U.S.C. § 521 and other provisions of the Code.

Furthermore, Krigel, the Trustee in the PBS case, has testified that she has discovered that the Debtors have concealed assets and that corporate assets may have been improperly used to pay the fees of a criminal defense attorney for McConnell. Krigel's testimony further suggests that other assets may have been improperly transferred or diverted immediately prior to the filing of the involuntary petitions. Therefore, it appears that Young and McConnell have concealed assets from the Trustees and may have engaged in improper transfers of assets.

(Cont'd)

unspecified amount of computer records in the PBS offices. A single copy of those records has been made at a purported cost of approximately $276,000.00, and the Court has previously entered an Order establishing procedures for the deposit of those records with a records depository and for equal access by all parties to those records.

15. Cook stated at the hearing on October 26 that Young and McConnell had been hopeful that they would have any possible criminal actions against them resolved by this time. Cook stated that proffers had been made to the United States Attorney's office but that those proffers had not yet been accepted by the Government.

It should also be kept in mind that Young and McConnell abruptly and apparently without warning ceased their business operations on August 10, 2001, and notified U.S. Bank, their principal creditor, that the bank should make arrangements to take care of the thousands of cattle owned by or under the care and custody of the Debtors and/or other affiliated entities. They have exhibited a blatant disregard for the preservation of the assets of their businesses and the assets of others. In light of these abuses, it would be a slap in the face of the creditors and investors and a perversion of the purposes of the Bankruptcy Code[16] to afford Young and McConnell an opportunity to now become involved in the administration of these estates and allow them to offer a plan of reorganization or liquidation.

In summary, it would make a mockery of the Bankruptcy Code to allow these Debtors to convert these cases to Chapter 11. There are "extreme circumstances" in these cases that warrant denial of the Motions to Convert. The Debtors — acting through Young and McConnell — are responsible for creating the exigent circumstances in these cases. They abandoned thousands of cattle and effectively placed them in the hands of their bankers for care and feeding. They have refused to cooperate with the Trustees and have declined to provide testimony that is needed for the efficient administration of these estates, apparently because of their fears that what they say might incriminate them in criminal proceedings. They have refused to sign bankruptcy schedules under penalty of perjury. It appears that estate assets may

16. The purpose of Chapter 7 is to enable honest debtors to get a "fresh start," *Grogan v. Garner*, 498 U.S. 279, 111 S.Ct. 654, 659, 112 L.Ed.2d 755 (1991).

have been improperly concealed or transferred, including a transfer of $100,000 to McConnell's criminal defense attorney. Because of the Debtors' noncompliance and failure to perform their required statutory duties, the Trustees, the creditors, and the Court have been compelled to develop complicated procedural orders to provide access to the Debtors' voluminous records. The Trustees have been compelled to borrow in excess of a million dollars simply to feed and care for the abandoned cattle until they are ready for market. Granting these motions would only further complicate these cases and foster confusion among the creditors and other interested parties. Moreover, granting the motions would be an act in futility because grounds exist for immediate reconversion to Chapter 7. No one will benefit by having these motions granted only to be undone by the next motion.

The Court will readily acknowledge that the Court's power to deny conversion in any case should be exercised sparingly. *Krishnaya*, 263 B.R. at 69. At the same time, the courts possess inherent power to protect their jurisdiction and process from abuse, *Spencer*, 137 B.R. at 511, and it is the duty of the Bankruptcy Court "to use its sound discretion to prevent the debtor from choosing chapters in violation of public policy and in disregard of the legitimate interests of creditors." *Starkey*, 179 B.R. at 693-94. The courts must exercise this discretion and power when the circumstances warrant it. This is one of those cases.

Appendix D

ORDER

Therefore, for the reasons stated hereinabove, the Motions to Convert filed in these cases by George L. Young and Professional Business Services, Inc., are hereby DENIED.

SO ORDERED this 15th day of November, 2001.

s/ Jerry W. Venters
United States Bankruptcy Judge

APPENDIX E — ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF MISSOURI FOR RELIEF UNDER CHAPTER 7 DATED AUGUST 22, 2001

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF MISSOURI

Bankruptcy Case No. 01-50704-1

IN RE

GEORGE L. YOUNG

Debtor(s)

Social Security No:
Employer Tax I.D. No.:

ORDER FOR RELIEF UNDER CHAPTER 7

On consideration of the petition filed on *AUGUST 20. 2001* against the above-named debtor, and the answer to the involuntary petition filed on August 22, 2001, an order for relief under Chapter 7 of the Bankruptcy Code (title 11 of the United States Code) is granted. Schedules, Statements and Mailing Matrix are due within 15 days of the date of this Order.

Dated this 22nd day of August, 2001.

s/ Jerry W. Venters
Bankruptcy Judge

APPENDIX F — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DENYING PETITION FOR REHEARING DATED FEBRUARY 7, 2007

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No: 06-1421

In re: George L. Young, et al.,

Alfred Neuberger Cattle Company, INC., et al.,

Appellees

v.

George L. Young and Professional Business Services, Inc.,

Appellants

George L. Young and Professional Business Services, Inc.,

Appellants

v.

Robert A. Pummill, Trustee for the Estate of George L. Young, et al.,

Appellees

U.S. BANK NATIONAL ASSOCIATION,

Appellee

George L. Young,

Appellant

Appendix F

Allan Messinger, and, et al.,

Appellees

George L. Young,

Appellant

Grauf Cattle Farms, INC., et al.,

Appellees

George L. Young,

Appellant

Jim Hammond, et al.,

Appellees

George L. Young,

Appellant

United Producers, INC.,

Appellee

George L. Young,

Appellant

Appeal from U.S. Bankruptcy Court for the
Western District of Missouri - Kansas City
(05-6013)

Appendix F

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Melloy and Judge Benton did not participate in the consideration or decision of this matter.

February 07, 2007

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.
s/ Michael E. Gans

APPENDIX G — CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 11 United States Code 101 (41)

Definitions.

"person" includes individual, partnership, and corporation, but does not include governmental unit, except that a governmental unit that —

(A) acquires an asset from a person —

(i) as a result of the operation of a loan guarantee agreement; or

(ii) as receiver or liquidating agent of a person;

(B) is a guarantor of a pension benefit payable b or on behalf of the debtor or an affiliate of the debtor; or

(C) is the legal or beneficial owner of an asset of —

(i) an employee pension benefit plan that is a governmental plan, as defined in section 414 (d) of the Internal Revenue Code of 1986; or

(ii) an eligible deferred compensation plan, as defined in section 457 (b) of the

Internal Revenue Code of 1986; shall be considered, for purposes of section 1102 of this title, to be a person with respect to such asset or such benefit;

Title 11 United States Code 303

Involuntary cases.

(b) An involuntary case against a person is commenced by the filing with the bankruptcy court of a petition under chapter 7 or 11 of this title —

(1) by three or more entities, each of which is either a holder of a claim against such person that is not contingent as to liability or the subject of a bona fide dispute, or an indenture trustee representing such a holder, if such claims aggregate at least $10,000 more than the value of any lien on property of the debtor securing such claims held by the holders of such claims;

(2) if there are fewer than 12 such holders, excluding any employee or insider of such person and any transferee of a transfer that is voidable under section 544, 545, 547, 548, 549, or 724 (a) of this title, by one or more of such holders that hold in the aggregate at least $10,000 of such claims;

(3) if such person is a partnership —

(A) by fewer than all of the general partners in such partnership; or

(B) if relief has been ordered under this title with respect to all of the general partners in such partnership, by a general partner in such partnership, the trustee of such a general partner, or a holder of a claim against such partnership; or

(4) by a foreign representative of the estate in a foreign proceeding concerning such person.

(c) After the filing of a petition under this section but before the case is dismissed or relief is ordered, a creditor holding an unsecured claim that is not contingent, other than a creditor filing under subsection (b) of this section, may join in the petition with the same effect as if such joining creditor were a petitioning creditor under subsection (b) of this section.

(d) The debtor, or a general partner in a partnership debtor that did not join in the petition, may file an answer to a petition under this section.

(e) After notice and a hearing, and for cause, the court may require the petitioners under this section to file a bond to indemnify the debtor for such amounts as the court may later allow under subsection (i) of this section.

(f) Notwithstanding section 363 of this title, except to the extent that the court orders otherwise, and until an order for relief in the case, any business of the debtor may continue to operate, and the debtor may continue to use, acquire, or dispose of property as if an involuntary case concerning the debtor had not been commenced.

(g) At any time after the commencement of an involuntary case under chapter 7 of this title but before an order for relief in the case, the court, on request of a party in interest, after notice to the debtor and a hearing, and if necessary to preserve the property of the estate or to prevent loss to the estate, may order the United States trustee to appoint an interim trustee under section 701 of this title to take possession of the property of the estate and to operate any business of the debtor. Before an order for relief, the debtor may regain possession of property in the possession of a trustee ordered appointed under this subsection if the debtor files such bond as the court requires, conditioned on the debtor's accounting for and delivering to the trustee, if there is an order for relief in the case, such property, or the value, as of the date the debtor regains possession, of such property.

(h) If the petition is not timely controverted, the court shall order relief against the debtor in an involuntary case under the chapter under which the petition was filed. Otherwise, after trial, the court shall order relief against the debtor in an involuntary case under the chapter under which the petition was filed, only if —

(1) the debtor is generally not paying such debtor's debts as such debts become due unless

such debts are the subject of a bona fide dispute; or

(2) within 120 days before the date of the filing of the petition, a custodian, other than a trustee, receiver, or agent appointed or authorized to take charge of less than substantially all of the property of the debtor for the purpose of enforcing a lien against such property, was appointed or took possession.

(i) If the court dismisses a petition under this section other than on consent of all petitioners and the debtor, and if the debtor does not waive the right to judgment under this subsection, the court may grant judgment —

(1) against the petitioners and in favor of the debtor for —

(A) costs; or

(B) a reasonable attorney's fee; or

(2) against any petitioner that filed the petition in bad faith, for —

(A) any damages proximately caused by such filing; or

(B) punitive damages.

(j) Only after notice to all creditors and a hearing may the court dismiss a petition filed under this section —

(1) on the motion of a petitioner;

(2) on consent of all petitioners and the debtor; or

(3) for want of prosecution.

(k) Notwithstanding subsection (a) of this section, an involuntary case may be commenced against a foreign bank that is not engaged in such business in the United States only under chapter 7 of this title and only if a foreign proceeding concerning such bank is pending.

Title 28 United States Code § 158.

Appeals.

(a) The district courts of the United States shall have jurisdiction to hear appeals [1]

(1) from final judgments, orders, and decrees;

(2) from interlocutory orders and decrees issued under section 1121 (d) of title 11 increasing or reducing the time periods referred to in section 1121 of such title; and

(3) with leave of the court, from other interlocutory orders and decrees; and, with leave

of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

(b)

(1) The judicial council of a circuit shall establish a bankruptcy appellate panel service composed of bankruptcy judges of the districts in the circuit who are appointed by the judicial council in accordance with paragraph (3), to hear and determine, with the consent of all the parties, appeals under subsection (a) unless the judicial council finds that —

(A) there are insufficient judicial resources available in the circuit; or

(B) establishment of such service would result in undue delay or increased cost to parties in cases under title 11.

Not later than 90 days after making the finding, the judicial council shall submit to the Judicial Conference of the United States a report containing the factual basis of such finding.

(2)

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(A) A judicial council may reconsider, at any time, the finding described in paragraph (1).

(B) On the request of a majority of the district judges in a circuit for which a bankruptcy appellate panel service is established under paragraph (1), made after the expiration of the 1-year period beginning on the ate such service is established, the judicial council of the circuit shall determine whether a circumstance specified in subparagraph (A) or (B) of such paragraph exists.

(C) On its own motion, after the expiration of the 3-year period beginning on the date a bankruptcy appellate panel service is established under paragraph (1), the judicial council of the circuit may determine whether a circumstance specified in subparagraph (A) or (B) of such paragraph exists.

(D) If the judicial council finds that either of such circumstances exists, the judicial council may provide for the completion of the appeals then pending before such service and the orderly termination of such service.

(3) Bankruptcy judges appointed under paragraph (1) shall be appointed and may be reappointed under such paragraph.

(4) If authorized by the Judicial Conference of the United States, the judicial councils of 2 or more circuits may establish a joint bankruptcy appellate panel comprised of bankruptcy judges from the districts within the circuits for which such panel is established, to hear and determine, upon the consent of all the parties, appeals under subsection (a) of this section.

(5) An appeal to be heard under this subsection shall be heard by a panel of 3 members of the bankruptcy appellate panel service, except that a member of such service may not hear an appeal originating in the district for which such member is appointed or designated under section 152 of this title.

(6) Appeals may not be heard under this subsection by a panel of the bankruptcy appellate panel service unless the district judges for the district in which the appeals occur, by majority vote, have authorized such service to hear and determine appeals originating in such district.

(c)

(1) Subject to subsection (b), each appeal under subsection (a) shall be heard by a 3-judge

panel of the bankruptcy appellate panel service established under subsection (b)(1) unless —

(A) the appellant elects at the time of filing the appeal; or

(B) any other party elects, not later than 30 days after service of notice of the appeal;

to have such appeal heard by the district court.

(2) An appeal under subsections (a) and (b) of this section shall be taken in the same manner as appeals in civil proceedings generally are taken to the courts of appeals from the district courts and in the time provided by Rule 8002 of the Bankruptcy Rules.

(d) The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section.

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Rule 8 Federal Rules of Civil Procedure.

General Rules of Pleading.

(a) Claims for Relief.

A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.

(b) Defenses; Form of Denials.

A party shall state in short and plain terms the party's defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If a party is without knowledge or information sufficient to form a belief as to the truth of an averment, the party shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, the pleader shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, the pleader may make denials as specific denials of designated averments or paragraphs, or may generally deny

all the averments except such designated averments or paragraphs as the pleader expressly admits; but, when the pleader does so intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, the pleader may do so by general denial subject to the obligations set forth in Rule 11.

(c) Affirmative Defenses.

In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

(d) Effect of Failure To Deny.

Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

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(e) Pleading to be Concise and Direct; Consistency

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal, equitable, or maritime grounds. All statements shall be made subject to the obligations set forth in Rule 11.

(f) Construction of Pleadings

All pleadings shall be so construed as to do substantial justice.

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Rule 12 Federal Rules of Civil Procedure.

Defenses and Objections — When and How Presented — By Pleading or Motion — Motion for Judgment on the Pleadings.

(a) When Presented.

(1) Unless a different time is prescribed in a statute of the United States, a defendant shall serve an answer

(A) within 20 days after being served with the summons and complaint, or

(B) if service of the summons has been timely waived on request under Rule 4(d), within 60 days after the date when the request for waiver was sent, or within 90 days after that date if the defendant was addressed outside any judicial district of the United States.

(2) A party served with a pleading stating a cross-claim against that party shall serve an answer thereto within 20 days after being served. The plaintiff shall serve a reply to a counterclaim in the answer within 20 days after service of the answer, or, if a reply is ordered by the court, within 20 days after service of the order, unless the order otherwise directs.

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(3)

(A) The United States, an agency of the United States, or an officer or employee of the United States sued in an official capacity, shall serve an answer to the complaint or cross-claim — or a reply to a counterclaim — within 60 days after the United States attorney is served with the pleading asserting the claim.

(B) An officer or employee of the United States sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States shall serve an answer to the complaint or cross-claim — or a reply to a counterclaim — within 60 days after service on the officer or employee, or service on the United States attorney, whichever is later.

(4) Unless a different time is fixed by court order, the service of a motion permitted under this rule alters the periods of time as follows:

(A) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action; or

(B) if the court grants a motion for a more definite statement, the responsive pleading shall be served within 10 days after the service of the more definite statement.

(b) How Presented.

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

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(c) Motion for Judgment on the Pleadings.

After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(d) Preliminary Hearings.

The defenses specifically enumerated (1)-(7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

(e) Motion For More Definite Statement.

If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time as the court may fix,

the court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) Motion To Strike.

Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon the party or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

(g) Consolidation of Defenses in Motion.

A party who makes a motion under this rule may join with it any other motions herein provided for and then available to the party. If a party makes a motion under this rule but omits therefrom any defense or objection then available to the party which this rule permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h)(2) hereof on any of the grounds there stated.

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Rule 1011 Federal Rules of Bankruptcy Procedure.

Responsive Pleading or Motion in Involuntary and Ancillary Cases.

(a) Who may contest petition.

The debtor named in an involuntary petition or a party in interest to a petition commencing a case ancillary to a foreign proceeding may contest the petition. In the case of a petition against a partnership under Rule 1004, a nonpetitioning general partner, or a person who is alleged to be a general partner but denies the allegation, may contest the petition.

(b) Defenses and objections; when presented.

Defenses and objections to the petition shall be presented in the manner prescribed by Rule 12 F.R.Civ.P. and shall be filed and served within 20 days after service of the summons, except that if service is made by publication on a party or partner not residing or found within the state in which the court sits, the court shall prescribe the time for filing and serving the response.

(c) Effect of motion.

Service of a motion under Rule 12(b) F.R.Civ.P. shall extend the time for filing and serving a responsive pleading as permitted by Rule 12(a) F.R.Civ.P.

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(d) Claims against petitioners.

A claim against a petitioning creditor may not be asserted in the answer except for the purpose of defeating the petition.

(e) Other pleadings.

No other pleadings shall be permitted, except that the court may order a reply to an answer and prescribe the time for filing and service.